



**THE ATTORNEY GENERAL
OF TEXAS**

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AUSTIN, TEXAS 78711

December 17, 1968

James E. Peavy, M.D.
Commissioner of Health
Texas State Department of Health
Austin, Texas

Opinion No. M-320

Re: Whether a milk product containing over 2.0% butterfat but less than 3.25% butterfat is "milk" within the meaning of Article 165-3, Vernon's Civil Statutes, and related questions.

Dear Dr. Peavy:

You have requested the opinion of this office concerning the question of:

"... whether or not a milk product containing over 2.0% butterfat but less than 3.25% butterfat is in fact 'milk' within the meaning of Senate Bill 437 as passed by the 60th Legislature at its Regular Session."

Senate Bill 437, Acts of 60th Leg., Regular Session, 1967, Chapter 734, page 1974, made certain amendments to Article 165-3, Vernon's Civil Statutes. Subsection A in Section 1 of Article 165-3 sets forth the following definition:

"Milk. Milk is hereby defined to be the lacteal secretion, practically free from colostrum, obtained by the complete milking of one or more healthy cows, which contains not less than 8-1/4 percent milk solids-not-fat and not less than 3-1/4 percent milkfat. (Milkfat or butterfat is the fat of milk.)" (Emphasis added.)

As the milk product to which you refer in your question contains less than 3.25% butterfat, such product does not meet the standards or requirements set forth for "milk" as defined by Section 1 of Article 165-3.

Subsection F in Section 1 of Article 165-3 sets forth the definition of "Skim Milk" or "Skimmed Milk", and provides in part as follows:

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" . . . Skim milk or skimmed milk is milk from which sufficient milkfat has been removed to reduce its milkfat content to less than 0.50 percent. . . . " (Emphasis added.)

Subsection G in Section 1 of Article 165-3 sets forth the definition of "Lowfat Milk", and provides in part as follows:

" . . . Lowfat milk is milk from which a sufficient portion of milkfat has been removed to reduce its milkfat content to not less than 0.50 percent and not more than 2.0 percent. . . . " (Emphasis added.)

As the milk product to which you refer in your question contains more than 2.0% butterfat, such product exceeds the maximum butterfat content of both "Skimmed Milk" and "Lowfat Milk" as defined by Section 1 of Article 165-3.

In view of the foregoing, and by virtue of the definitions set forth in Section 1 of Article 165-3, we are of the opinion that a milk product containing over 2.0% butterfat but less than 3.25% butterfat is not "milk" within the meaning of the provisions of Article 165-3.

You have raised the further question of whether the milk product to which you refer is a regulated product within the provisions of Article 165-3, even if such milk product is not "milk" within the meaning of Article 165-3.

While the provisions of Article 165-3 apply to those milk products defined therein, a milk product not within such definitions is nevertheless regulated to a certain extent by such provisions. Subsection T-1 in Section 1 of Article 165-3 provides in part that:

"Milk and milk products are misbranded . . . ; (2) when such milk and milk products do not conform to their definitions as contained in this Act; . . . "

Should a milk product not within the definitions set forth in Section 1 of Article 165-3 be offered for sale as one of the defined milk products, then, in such event, the product would be misbranded and the person so violating the statute would be subject to the penalties of Article 165-3. To this extent, the

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milk product to which you have referred is regulated by the provisions of Article 165-3.

You have further raised the question of whether the milk product to which you referred is subject to the provisions of Article 165-3a, Vernon's Civil Statutes.

Section 2 of Article 165-3a, the "Texas Equal Health Standard Milk Sanitation Act of 1961", provides in part that:

"The purpose of this Act is to utilize effectively existing agencies and departments in regulating, processing, and distributing milk and milk products to the end that Texas consumers will be assured of a full supply of wholesome, high quality milk, cream, and milk products by requiring that all Grade 'A' pasteurized milk and/or Grade 'A' raw milk for pasteurization shipped into Texas be produced under rules, regulations, and statutes providing standards as high or higher than those provided by the Texas Milk Grading and Labeling Law . . . (codified as Article 165-3, . . .) . . ."
(Emphasis added.)

Section 3 of Article 165-3a provides in part that:

"From and after the effective date of this Act, no person, officer, or inspector authorized under the laws of this State or any municipality within the State to inspect or regulate the production of fluid milk of whatever quality, shall in anywise approve, grant, or issue a permit, certificate, or other authorization for Grade 'A' pasteurized milk and/or Grade 'A' raw milk for pasteurization to be shipped into Texas unless the same is produced in accordance with standards, rules, regulations, and statutes governing the production of milk in the State of Texas; and no such person, officer, or inspector shall in anywise permit, certify, or authorize the shipping of any Grade 'A' pasteurized milk and/or Grade 'A' raw milk for pasteurization into this State regardless of the grade, unless such person, officer, or inspector shall certify that such fluid milk was produced under equivalent rules and regulations required for the production of milk in the State of Texas. . . ." (Emphasis added.)

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Section 5 of Article 165-3a, which sets forth the penalties for violation of the act, refers once again to "Grade 'A' pasteurized milk" and "Grade 'A' raw milk for pasteurization."

Subsection P in Section 1 of Article 165-3 provides that:

" . . . Grade 'A' raw milk or milk products are milk or milk products which have been produced and handled in accordance with the specifications and requirements as promulgated by the Commissioner of Health and which grade and grade label has been determined and awarded by a City or County Health Officer or by his representative." (Emphasis added.)

Subsection Q in Section 1 of Article 165-3 provides that:

" . . . Grade 'A' pasteurized milk or milk products are milk or milk products which have been produced and pasteurized in accordance with the specifications and requirements as promulgated by the Commissioner of Health. . . ." (Emphasis added.)

Subsection O in Section 1 of Article 165-3 provides in part that:

"Milk products include cream, light cream, coffee cream, table cream, whipping cream, light whipping cream, heavy cream, heavy whipping cream, whipped cream, whipped light cream, whipped coffee cream, whipped table cream, sour cream, cultured sour cream, half-and-half, sour half-and-half, cultured half-and-half, reconstituted or recombined milk and milk products, concentrated milk, concentrated milk products, skim milk, skimmed milk, lowfat milk, fortified milk and milk products, vitamin D milk and milk products, homogenized milk, flavored milk or milk products, buttermilk, cultured buttermilk, cultured milk, cultured whole milk buttermilk, and acidified milk and milk products. . . ."

Since the provisions of Article 165-3a are restricted solely to "Grade 'A' pasteurized milk and/or Grade 'A' raw milk

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for pasteurization", and because the product to which you refer does not fall within the definition of such milk products, we are of the opinion that milk products containing over 2.0% butterfat but less than 3.25% butterfat are not subject to the provisions of Article 165-3a.

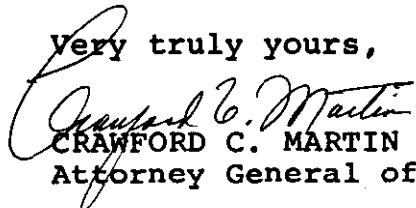
S U M M A R Y

A milk product containing over 2.0% butterfat but less than 3.25% butterfat is not "milk" within the meaning of Article 165-3, Vernon's Civil Statutes.

A milk product containing over 2.0% butterfat but less than 3.25% butterfat is not subject to regulation pursuant to the provisions of Article 165-3, except where such product is offered for sale as one of the milk products defined by Article 165-3.

A milk product containing over 2.0% butterfat but less than 3.25% butterfat is not subject to the provisions of Article 165-3a, Vernon's Civil Statutes.

Very truly yours,


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